STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Respondent-Petitioner.

APPEAL OF A NON-FINAL ORDER DENYING A PRELIMINARY INJUNCTION, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

PETITION FOR BYPASS OF THE WISCONSIN ELECTIONS COMMISSION

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INTRODUCTION

The Wisconsin Elections Commission seeks bypass so this Court may review the circuit court's denial of Robert F. Kennedy, Jr.'s quest for extraordinary relief: a temporary injunction requiring clerks to create and place stickers on four million Wisconsin ballots to remove his name.

Kennedy filed nomination papers and a declaration of candidacy to run for U.S. President in early August, but he changed his mind at the eleventh hour. Rather than run as a third-party candidate, he now prefers (at least in Wisconsin) to support a major party candidate. Kennedy's late request to remove his name from the ballot was barred by Wis. Stat. § 8.35(1), and so the Commission denied it. Undeterred, he proceeded to circuit court, seeking a temporary injunction, and losing there, petitioned for leave to appeal to the court of appeals. That court accepted his petition.

This question justifies prompt, final resolution by this Court: it is highly time sensitive and hugely consequential for the people of Wisconsin.

Kennedy appears to recognize that it is too late to reprint the ballots, which already are on their way to municipal clerks and absentee voters, including overseas and military voters. He proposes that all can be solved by requiring local clerks to create and affix stickers to every Wisconsin ballot, but that solution would ignore state law; force clerks to spend tens of thousands of hours creating and affixing stickers; and, as the circuit court put it, create a "logistical nightmare" that could threaten the accuracy of the election results and confidence in the election.

Kennedy's temporary injunction motion did not begin to justify such a poorly conceived remedy, and the circuit court appropriately exercised its discretion in denying it. The circuit court considered the law and facts in light of the temporary injunction factors and concluded that the balancing of equities favored clerks, voters, and the public; that Kennedy's asserted

harm flowed from his choice to put himself on the ballot in a state where the law prohibits withdrawing after qualifying for the ballot; and that Kennedy failed to demonstrate a reasonable likelihood of success on the merits where his reading of Wis. Stat. § 8.35(1) was unreasonable and he provided no support for the premise that a candidate has a constitutional right to be removed from the ballot.

The Commission asks this Court to grant bypass and affirm the circuit court's denial of relief.

ISSUE PRESENTED

Whether the circuit court appropriately exercised its discretion in denying a temporary injunction that would have required election clerks to reprint or hand-affix stickers to four million Wisconsin ballots to remove Kennedy's name.

RELIEF REQUESTED

The Commission respectfully requests that this Court take jurisdiction of this appeal and affirm the circuit court on an expedited basis.

STATEMENT OF THE CASE

Kennedy has appealed the circuit court's September 16 denial of a motion for temporary injunction. The following summarizes the relevant facts.

I. The Commission receives candidate papers for the November 2024 general election, including Kennedy's nomination papers and declaration of candidacy.

Robert F. Kennedy, Jr. and Nicole Shanahan submitted nomination papers and declarations of candidacy to the Commission on August 6, 2024, as independent candidates for President and Vice President in the November 2024 general election. (R. 44 (Declaration of Riley P. Willman ("Willman Decl.")) ¶¶ 3–6, Ex. A, Ex. C; 45 (Declaration of Steven C.

Kilpatrick ("Kilpatrick Decl.")) ¶ 7, Ex. E.) As part of their nomination papers, Kennedy and Shanahan indicated that they are the candidates for the "We the People" Party and listed the electors for that Party. (R. 45 (Kilpatrick Decl.) ¶ 7, Ex. E.)

On August 19, 2024, the Commission received a Certification of Nomination from the Democratic Party nominating Kamala Harris as its candidate for President and Tim Walz as its candidate for Vice President for the November 2024 general election. The Commission also received declarations of candidacy from Harris and Walz. (R. 44 (Willman Decl.) ¶ 8, Ex. D.) The Commission received no declaration of candidacy from current President Joe Biden or a Certification of Nomination from the Democratic Party nominating Biden. (R. 44 (Willman Decl.) ¶¶ 9–10.)

On August 23, 2024, Kennedy sent a letter to the Commission stating that he was "withdraw[ing] his candidacy from the 2024 United States Presidential Election" and requesting that his name not be printed on the ballot in Wisconsin. (R. 44 (Willman Decl.) ¶ 7, Ex. B.)

II. The Commission meets on August 27 to certify candidate names for the general election ballot and considers Kennedy's request to withdraw.

The Commission must provide required election notices to county clerks "no later than the 4th Tuesday in August," Wis. Stat. § 10.06(1)(i), which was August 27 this year. The required election notices contain the candidate and statewide referenda information that county clerks need to begin preparing ballots. The Commission convened on August 27 to perform this responsibility, consider challenges to nomination papers, and certify candidate names for the November 2024 general election ballot. (R. 45 (Kilpatrick Decl.) ¶¶ 5–6, Ex. C–D.)

Based on Wis. Stat. § 8.35(1), which provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person," the commissioners voted 5-1 to deny Kennedy's request to withdraw from the ballot. (R. 45 (Kilpatrick Decl.) ¶ 6, Ex. D.)

III. Clerks begin creating the ballots.

Wisconsin law requires that, "immediately upon receipt" of the Commission's notices, county clerks prepare the ballot forms. Wis. Stat. § 7.10(2). County clerks must integrate ballot information for local races and referenda onto ballot styles for each municipality. (R. 42 (Declaration of Robert Kehoe, dated September 13, 2024 ("Kehoe Decl.")) ¶¶ 5, 12.) They then must finalize and proof their ballots, place the print order, and ensure that they have sufficient ballots. (R. 42 (Kehoe Decl.) ¶ 5; 46 (Affidavit of Scott McDonell ("McDonell Aff.")) ¶ 8; 43 (Declaration of Michelle R. Hawley ("Hawley Decl.")) ¶¶ 8–9; 40 (Declaration of Lisa Tollefson ("Tollefson Decl.")) ¶ 9; 45 (Kilpatrick Decl.) ¶ 4, Ex. B.) The vast majority of county clerks must utilize a third-party vendor because of the technical requirements for ballots to be accurately scannable and fed through electronic tabulation machines. (R. 42 (Kehoe Decl.) ¶¶ 13–17; 43 (Hawley Decl.) ¶¶ 9, 11.)

This work must be completed by September 18, the last date by which county clerks must deliver printed ballots to municipal clerks — 48 days before the general election. Wis. Stat. § 7.10(3). (R. 42 (Kehoe Decl.) ¶¶ 7–10.)

Municipal clerks, in turn, must deliver absentee ballots to electors who request them no later than September 19, 47 days before the general election. Wis. Stat. § 7.15(1). (R. 42 (Kehoe Decl.) ¶ 7; 46 (McDonell Aff.) ¶¶ 5–6, 9.) And under the federal Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301-20311, municipalities

must send ballots to all military and overseas voters no later than September 21, 45 days prior to the election. (R. 42 (Kehoe Decl.) ¶¶ 8–10.)

Following the Commission's August 27 meeting, Wisconsin county clerks followed these statutory commands, finalizing the hundreds of individual ballot forms and placing orders with third-party vendors to print their ballots. (R. 42 (Kehoe Decl.) ¶ 22; 46 (McDonell Aff.) ¶¶ 7–8; 43 (Hawley Decl.) ¶¶ 8–9; 40 (Tollefson Decl.) ¶¶ 8–9.) There will be approximately four million ballots printed in the state. (R. 42 (Kehoe Decl.) ¶ 24.)

Print orders for ballots were scheduled to be completed by the September 18 deadline for providing ballots to municipal clerks. (R. 42 (Kehoe Decl.) ¶ 22; 46 (McDonell Aff.) ¶¶ 7–10; 43 (Hawley Decl.) ¶ 9.) If counties are required to reprint ballots, clerks would be unable to meet statutory deadlines to get ballots into the hands of the voters. (R. 42 (Kehoe Decl.) ¶ 18; 46 (McDonell Aff.) ¶¶ 11–12; 43 (Hawley Decl.) ¶ 10; 40 (Tollefson Decl.) ¶ 10.)

More than 80 percent of ballots cast in Wisconsin are optical scan ballots, which rely on a series of "timing marks"—lines along the top and sides of the ballot that serve as coordinates to allow the voting equipment to read which candidate to tally a vote for. Ballots must be thoroughly tested to make sure the timing marks work correctly before printing. (R. 42 (Kehoe Decl.) ¶ 13.)

IV. Kennedy files suit against the Commission and continues his campaign efforts elsewhere.

On September 3, Kennedy brought suit against the Commission, filing a chapter 227 petition for judicial review and a motion for a temporary injunction. (R. 2–4.) On September 4, Kennedy filed an ex parte motion for an emergency temporary restraining order. (R. 11.) On

September 6, the circuit court denied that motion and set a scheduling conference for September 11. (R. 29.)

On September 9, Kennedy filed a petition for leave for appeal the denial of his motion in District II. (R. 33.) On September 12, the court of appeals issued an order holding the petition in abeyance while the circuit court resolved Kennedy's motion for a temporary injunction. (R. 36.)

Meanwhile, Kennedy's interest in having voters choose him for President has continued in some states but not others. He has indicated that he does not seek support in states like Wisconsin where the presidential election is predicted to be close, but otherwise hopes voters will choose him in states where he has successfully been placed on the ballot. (R. 45 (Kilpatrick Decl.) ¶ 3, Ex. A).[1] Some of Kennedy's Wisconsin electors have indicated that they want him to remain on the Wisconsin ballot. (R. 42 (Kehoe Decl.) ¶ 26.)

V. Clerks express concern that Kennedy's sticker plan is unfeasible and would lead to the inaccurate tabulation of ballots.

On September 10, Kennedy's counsel stated in a letter to the court that, if Wisconsin's general election ballots were already being printed, Kennedy would seek an order requiring blank stickers to be placed over his name on every ballot. (R. 34.) The Commission is unaware of any situation where this has occurred. (R. 42 (Kehoe Decl.) ¶ 24.)

County clerks have expressed their serious concerns about that suggestion. (R. 43 (Hawley Decl.) ¶ 17; 40 (Tollefson Decl.) ¶ 15; 41 (Declaration of Trent Miner ("Miner Decl.")) ¶ 12; 46 (McDonell Aff.) ¶ 14.) The tabulation machines used for the upcoming election have not been tested

[1] Caitlin Yilek & Allison Novelo, *Map Shows Where RFK Jr. Is on the Ballot in the 2024 Election*, CBS News (Sept. 6, 2024), https://www.cbsnews.com/news/rfk-jr-map-on-the-ballot-states/ (last visited September 19, 2024).

with stickered ballots. (R. 42 (Kehoe Decl.) ¶ 25; 43 (Hawley Decl.) ¶ 17; 40 (Tollefson Decl.) ¶ 15; 41 (Miner Decl.) ¶ 14.) Misplaced stickers would produce errors in how the voter's choices are made. (R. 41 (Miner Decl.) ¶ 13.) Stickers could peel off, get jammed or stuck in the voting tabulator, or stick to and rip other ballots, making a jammed scanner unavailable on Election Day. (R. 42 (Kehoe Decl.) ¶ 25; 43 (Hawley Decl.) ¶ 17; 40 (Tollefson Decl.) ¶ 15; 41 (Miner Decl.) ¶ 14.)

In addition, machines are programmed to read ballot paper of a certain weight to avoid feeding more than one ballot into the machine at once. Placing a sticker on a ballot may produce a double ballot error, resulting in the return of the ballot to the voter. (R. 43 (Hawley Decl.) ¶ 17; 41 (Miner Decl.) ¶ 12.) Further, Ballot machines are designed to discern light marks in the target zone of a ballot where voters mark the ovals or arrows. Even a shadow or wrinkle (for instance, caused by how the sticker is applied) can cause the machine to register an overvote. On the presidential ballot, Kennedy's name is directly next to the oval for the We the People Party ticket. (Declaration of Robert Kehoe, dated September 19, 2024 ("Kehoe Decl.")) ¶¶ 4–6 & Ex. A.)

Placing stickers on four million paper ballots would be a herculean task for clerks and staff. (R. 40 (Tollefson Decl.) ¶ 13; 43 (Hawley Decl.) ¶ 16; 42 (Kehoe Decl.) ¶ 25; 41 (Miner Decl.) ¶ 13 (discussing that clerks in rural areas are part-time and have other, full-time jobs).) Even if sufficient volunteers could be gathered, the stickers might not fully obscure Kennedy's name. (R. 40 (Tollefson Decl.) ¶ 13.)

VI. The parties brief the temporary injunction motion, and the circuit court denies relief; Kennedy files a new petition for leave to appeal.

The circuit court held a status conference and set a briefing schedule on the temporary injunction motion. On September 13, the Commission and Kennedy filed briefs.

(R. 39; 53.) The Commission provided declarations from Commission staff and clerks around the State. (R. 40–44; 46.)

On September 16, at Kennedy's request, the circuit court held an evidentiary hearing for Kennedy to present evidence. (R. 70:2–3.) Kennedy did not present any affidavits or witnesses. He also noticed no Commission declarants and subpoenaed no clerks. (R. 70:3, 12, 16; R. 13.)

Later that day, the circuit court issued an oral ruling denying the temporary injunction. (R. 59; 60.) The court held that the equities of harms to clerks, voters, and the public outweighed Kennedy's asserted interests. The court pointed to the unbudgeted costs for clerks, missed deadlines for sending ballots, and the "logistical nightmare" posed by Kennedy's proposal. The court cited his charge to avoid confusion and incentives not to vote in the time leading up to the election:

> In our current highly charged political environment, and given the . . impending deadlines governing absentee ballots, and given the great uncertainty whether Appellant's request to place stickers on the ballots in lieu of preprinting would even work, I conclude the balance of equities weighs heavily against Appellant's request.

(R. 60:10.) The court balanced those harms against those asserted by Kennedy and pointed out that Kennedy had chosen to submit his nomination papers despite Wisconsin's statutory bar on withdrawal.

On the preservation of the status quo, the circuit court reasoned that this factor also weighed against issuing a temporary injunction because Kennedy sought the ultimate relief in the case. (R. 60:10–11.)

On the likelihood of success on the merits, the circuit court reasoned that Wis. Stat. § 8.35(1) does not permit withdrawal from the ballot once a candidate submits his nomination papers and declaration of candidacy. And it concluded that Kennedy's constitutional challenges to that

statute were unpersuasive: Kennedy offered no support for a constitutional right to be *removed* from the ballot. (R. 60:11–20.)

On September 17, Kennedy petitioned for leave to appeal the circuit court's order. (R. 61.) The court of appeals granted that order ex parte on September 18 and ordered merits briefing, including on questions relating to stickering ballots. *Kennedy v. WEC*, 2024AP1872, order dated September 18, 2024.

VII. During these proceedings, the election process has moved forward.

Meanwhile, the election process is moving forward. The Commission collects daily data from all 72 counties regarding the status of ballot processing in three categories: "Absentee Applications," "Ballots Sent," and "Ballots Returned." (Second Kehoe Decl. ¶ 7.)

Regarding applications, as of 7:30 a.m. on September 19, there were 391,194 absentee ballot applications already been received statewide. Ballots must be sent to those voters no later than September 19. The Commission estimates that about 6,000 applications are being added to this category each day. Clerks must send out ballots in response to those requests within 24 hours. (Kehoe Decl. ¶¶ 8–9 & Ex. B.)

Regarding ballots sent, as of 7:30 a.m. on September 19, there were 343,742 ballots that had been sent statewide. (Kehoe Decl. ¶¶ 10–11 & Ex. B.)

ARGUMENT

I. This appeal warrants bypass under this Court's recognized criteria.

Wisconsin Stat. § 808.05(1) provides that this Court may take jurisdiction of an appeal if "[i]t grants direct review upon a petition to bypass filed by a party." Wisconsin Stat. § (Rule) 809.60(1)(a) provides that a party may file with this

Court "a petition to bypass the court of appeals pursuant to s. 808.05 no later than 14 days following the filing of the respondent's brief under s. 809.19 or response."

A. Bypass is warranted where this Court is very likely to review the matter and where there is a clear need to hasten the ultimate appellate decision.

This Court's internal operating procedures set forth circumstances where bypass is warranted. Two are relevant here. A matter appropriate for bypass is one the Court would ultimately choose to consider "regardless of how the Court of Appeals might decide the issues." Wisconsin Supreme Court Internal Operating Procedures, § II.B.2. Additionally, "[a]t times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision." *Id*.

B. The subject of the appeal and exigent timing support this Court's immediate review.

Bypass is appropriate here under both factors. This appeal is a type of case that this Court has considered in the past, including on bypass, and it is an urgent matter requiring finality before the November 5, 2024, general election.

1. Whether to grant relief to a candidate seeking a change in the ballot is a question this Court has historically considered.

The nature of this proceeding weighs in favor of bypass. This Court has previously considered cases, including in the recent past, involving questions about which candidates should appear on the ballot. *See Strange v. WEC*, 2024AP1643-OA, order issued August 26, 2024 (denying petition for original action but concluding that "the petitioner is not entitled to the relief he seeks"); *Phillips v. WEC*, 2024AP138-OA, order issued February 2, 2024 (granting petitioner's request to be placed on the Presidential

preference primary ballot); *Hawkins v. WEC*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877 (denying relief to two candidates who were not on the general election ballot).

This petition also warrants acceptance based on the Court's historical treatment of election-related matters during an election year. *See Priorities USA v. WEC*, No. 2024AP0164 (Wis. Sup. Ct.) (election-related issue, bypass granted); *Brown v. WEC*, No. 2024AP0232 (Wis. Sup. Ct.) (election-related issue, bypass granted). It has also done so in previous years. *See*, *e.g.*, *Jefferson v. Dane County*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556 (election-related issue, original action petition accepted); *Trump v. Biden,* 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568 (election-related issue, original action petition accepted); *Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519 (election-related issue, bypass granted).

2. This matter has even greater urgency because of the ongoing election.

Bypass is especially critical here because of the timing of this matter. The State is in the middle of the 2024 general election cycle. This Court should provide final resolution of this case and avoid an interim appellate court decision that disrupts or casts doubt on that process, or causes clerks to commence an all-hands-on-deck stickering effort.

The general election will take place on November 5. Municipal clerks deliver absentee ballots to electors who already requested them no later than September 19. Wis. Stat. § 7.15(1). And under the federal Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301-20311, municipalities must send ballots to all military and overseas voters no later than September 21, 45 days prior to the election.

According to the Commission's ongoing data collection, as of the morning of September 19, there were 391,194 absentee ballot applications already received, with about 6,000 additional applications being added each day, and 343,742 ballots already sent out by clerks.

II. The record demonstrates that the circuit court appropriately exercised its discretion in denying relief.

The appellate record here features developed facts and arguments to evaluate the circuit court's order. It demonstrates that the circuit court reasonably applied the relevant factors in denying the motion for a temporary injunction, and its decision reflected an appropriate exercise of discretion.

A. Standard of review: the circuit court's order is discretionary and will be upheld unless the court erroneously exercised its discretion.

The issuance or denial of a temporary injunction is discretionary and will be upheld unless the court erroneously exercised its discretion.

A decision to grant or deny an injunction "is within the sound discretion of the circuit court," *Hoffmann v. Wisconsin Electric Power Co.*, 2003 WI 64, ¶ 10, 262 Wis. 2d 264, 664 N.W.2d 55, "and will only be reversed for an erroneous exercise of discretion." *Sch. Dist. of Slinger v. WIAA***,** 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). "The test is not whether [this] court would grant the injunction." *Id.* Rather, the test is deferential and primarily serves to ensure that the decision was arrived at by the application of the proper legal standards and based upon the facts in the record. *See LeMere v. LeMere*, 2003 WI 67, ¶¶ 13–14, 262 Wis. 2d 426, 436, 663 N.W.2d 789, 793. "A circuit court's discretionary decision is upheld as long as the court "examined the relevant facts,

applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Long v. Long,* 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995).

B. The circuit court's order here was a reasonable exercise of discretion.

Here, the circuit court did its job: it looked at the facts in the record, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach. Its decision should be affirmed.

Wisconsin Stat. § 813.02(1)(a) authorizes courts to issue temporary restraining orders and injunctions when certain factors are met. Wis. Stat. § 813.02(1)(a). Circuit courts must balance four criteria: "(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted). "The purpose of 'a temporary injunction is to maintain the status quo, not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought.'" *Sch. Dist. of Slinger*, 210 Wis. 2d at 364 (citation omitted).

1. The circuit court balanced the competing equities and found they weighed against granting the relief sought.

The circuit court reasonably determined that the balancing of equities weighed against the injunction. The injury to the Wisconsin electorate from the proposed injunction far outweighs Kennedy's asserted interest in being off the ballot in Wisconsin.

Kennedy provided no evidence of injury in the circuit court. In contrast, the Commission's filing was replete with declarations from state and local election officials explaining why Kennedy's proposed injunction would derail the state's preparations for the November general election and, in some respects, be impossible to implement.

Kennedy appears to recognize that it is too late to reprint ballots. Ignoring the fact that many ballots have already been sent to voters, he says someone (he suggests the Commission) could craft and hand-affix blank stickers over his name on every ballot. He offered no evidentiary support for the workability of this solution, and, as the circuit court observed, it would be a "logistical nightmare." (R. 60:8.)

First, Kennedy's suggestion is prohibited by statute. State law prohibits election officials from attaching any type of sticker to a ballot. Wis. Stat. § 5.51(4).[2] There is one exception—for the death of a candidate, when a replacement nominee is selected—that obviously does not apply. Kennedy offers no support for the premise that courts can order injunctive relief that violates statutory prohibitions.

Insofar as Kennedy sees the deceased candidate provision as demonstrating the factual workability of his solution, Wis. Stat. § 7.38 does not have the purpose or method he suggests. That statute allows a deceased candidate's political party to *replace* him with a different nominee by providing municipal clerks with customized, properly-sized stickers with the new candidate's name. That is a wholly different process than Kennedy's proposal.

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[2] Kennedy's court of appeals brief, filed September 19, points to a reference in the Elections Manual discussing stickers for write-in candidates. Although the manual was not updated, that option was eliminated by the legislature. 2015 Wis. Act 37 removed the ability of voters to use a sticker to indicate their choice for a candidate under Wis. Stat. § 7.50.

Simply as a matter of getting stickers hand cut and affixed, Kennedy's idea would present a herculean task. Even if stickers could be affixed at about 30 seconds per sticker (unlikely, given that stickers would need to be hand cut to cover only Kennedy's name), it would require tens of thousands of man hours to affix stickers to four million ballots. Counties and municipalities would miss federal and state deadlines for ballot distribution. Not all ballots would be the same: many ballots have already been sent to voters.

Most concerningly, Kennedy's proposal would jeopardize the accurate tabulation of the ballots. The voting equipment has not been tested with stickers applied to ballots. Stickers may peel off, get jammed or stuck in the voting tabulator, or stick to and rip other ballots. Stickers stuck in the machine could take a polling place's machine out of service for Election Day.

More than 80 percent of ballots cast in Wisconsin are optical scan ballots containing a series of "timing marks"—lines along the top and sides of the ballot—that serve as coordinates to allow the voting equipment to read what candidate to tally a vote for. Election officials have no idea how voting equipment would count ballots with stickers over a candidate's name. The machines are sensitively calibrated to recognize any difference in the weight of a ballot. The extra weight of a sticker could cause the machine to read the ballot as a double ballot and not count it. The machines are calibrated to read even a light mark so that no vote goes uncounted, and a sticker in the target area of an oval or error could register a double vote. And, as the circuit court recognized, affixing four million stickers would not be error-free. The inevitable errors would lead to miscounting, voter confusion, and potential distrust in the election results.

The circuit court weighed those equities against Kennedy's asserted interests. It concluded the equities weighed against an injunction: it noted that Kennedy chose to

file his nomination papers and declaration of candidacy in a state where candidates may not withdraw, and that Kennedy continues to ask voters in other states to select him.

The circuit court was well within its discretion in concluding that the equities weighed against an injunction.

2. The circuit court reasonably determined that Kennedy's request would upend, not preserve, the status quo.

The circuit court held that Kennedy failed the requirement that a temporary injunction only preserve the status quo, not grant the ultimate relief he sought. (R. 60:7, 10–11.) This, too, was reasonable.

3. The circuit court correctly concluded that Kennedy did not make a showing of a reasonable probability of success on the merits.

The circuit court correctly concluded that Kennedy did not show that he had a reasonable probability of success on the merits. (R. 60:11–20.) His statutory construction argument was not reasonable, and he provided no relevant legal support for his claim that the statutes are unconstitutional.

a. Kennedy's reading of Wis. Stat. § 8.35(1) is unpersuasive.

As the circuit court concluded, Kennedy's reading of Wis. Stat. § 8.35(1) is unpersuasive.

Wisconsin Stat. § 8.35(1) states that "[a]ny person who [1] files nomination papers and [2] qualifies to appear on the ballot *may not decline nomination*. The name of that person *shall appear upon the ballot* except in case of death of the person."

Kennedy filed nomination papers with the Commission on August 6, 2024. He filed a declaration of candidacy with the Commission the same day. A declaration of candidacy is a sworn declaration that states the candidate's name and "[t]hat the signer meets, or will at the time he or she assumes office meet, applicable age, citizenship, residency, or voting *qualification requirements*, if any, prescribed by the constitutions and laws of the United States and of this state. . . . [And t]hat the signer will otherwise *qualify for office* if nominated and elected." Wis. Stat. § 8.21.2(a)–(c).

Kennedy met the two requirements under Wis. Stat. § 8.35(1) to have his name placed on the ballot: he filed nomination papers and a declaration that he meets the qualifications for the office he sought. Under the statute's plain language, he "may not decline nomination," and his name "shall appear upon the ballot." Wis. Stat. § 8.35(1). The statute contains only one exception—for situations where the candidate dies—but that does not apply here.

A prior version of the statute allowed candidates to withdraw after submitting their nomination papers and declarations of candidacy. "'A review of statutory history is part of a plain meaning analysis' because it is part of the context in which we interpret statutory terms." *County of Dane v. LIRC*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571 (quoting *Richards v. Badger Mut. Ins. Co.,* 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581). The 1965 version of the statute permitted a candidate who had filed nomination papers to "decline the nomination," if he did so "in one week after the last day on which nomination papers can be filed." Wis. Stat. § 5.18 (1965). While Kennedy would not have even met that deadline, the option no longer exists in today's law.

Kennedy argues that "qualifies" means official Commission approval (R. 61:12), which he says cannot happen if the candidate withdraws. That theory has no foundation in Wis. Stat. § 8.35(1), which references no Commission ballot

access approval process based on a withdrawal statement. A cardinal "maxim[ ] of statutory construction . . . [is] that courts should not add words to a statute to give it a certain meaning." *State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165. As the circuit court concluded, Kennedy's reading would add language that does not exist.

Kennedy's reading also conflicts with another election statute. Wisconsin Stat. § 5.64(1)(ar)1m. requires voters to vote for a ticket of both the President and Vice President: "[w]hen voting for president and vice president, the ballot shall permit an elector to vote only for the candidates on one ticket *jointly* or write the names of both persons in both spaces." The "We the People" vice-presidential candidate, Shanahan, submitted no withdrawal statement, and ticket voting would be impossible if Kennedy's name were absent.

b. Kennedy misunderstands the standard of review for laws governing the administration of elections.

Kennedy pivots to a constitutional challenge to the election statutes, but he misunderstands the standard of review for such a challenge, asserting they are subject to "strict scrutiny" review. (R. 61:20.) Whether as a matter of equal protection or First Amendment, challenges to ballot access deadlines are reviewed under a balancing test that weighs the state's interests in orderly and reliable election administration against the alleged burden on the rights of the candidate or voter. Unless the burden is severe, reasonable requirements are upheld.

States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder: "As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."

Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). The mere fact that election laws create barriers tending to limit the field of candidates from which voters might choose "does not of itself compel close scrutiny." *Id.* (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

Instead, "a more flexible standard" applies: a court considering a challenge to a state election law on First and Fourteenth Amendment grounds must weigh the "character and magnitude" of the burden the law imposes against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Id*. (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Under this standard, regulations imposing a "severe" burden on the plaintiff's rights must be narrowly tailored and advance a compelling state interest, but lesser burdens trigger less exacting review. *Id*. (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). The State's "important regulatory interests are generally sufficient to justify" an election law that imposes only "reasonable, nondiscriminatory restrictions" on First and Fourteenth Amendment rights. *Id*. (quoting *Celebrezze*, 460 U.S. at 788).

c. Ballot access deadlines are constitutional so long as they are reasonable regulations on the conduct of elections.

Kennedy has asserted that the differing ballot access deadlines for independent and major party candidates give major parties an "advantage" because they have "more time to vet a candidate" and to "contemplate the best course of action." (R. 61:19.) As an initial matter, Kennedy is not making a ballot access challenge: his case is about an asserted right to be removed from the ballot.

But even if this were a case about ballot access, the "advantages" Kennedy describes are not constitutionally significant. The U.S. Supreme Court has determined that "[t]he State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Celebrezze*, 460 U.S. at 788 n.9.

In *Celebrezze*, the U.S. Supreme Court considered what nomination paper deadlines were reasonable restrictions on independent candidates. It rejected the March deadline then in Ohio statutes as unrelated to the time for petition signatures to be counted and verified or to permit ballots to be printed, but it noted that, based on the facts stipulated to in the district court, a 75-day statutory deadline would have been reasonable. *Celebrezze,* 460 U.S. 800 & n.28. In 1983, when *Celebrezze* issued, two-thirds of the states had nomination paper deadlines for independent candidates in August or September, with many others in June or July. *Celebrezze*, 460 U.S. at 795 n.20; *see also U.S. Taxpayers Party of Fla. v. Smith*, 871 F. Supp. 426, 436–37 (N.D. Fla. 1993).

Wisconsin is in the mainstream of those deadlines. Wisconsin's nomination procedures in Wis. Stat. § 8.16(7) and 8.20(8)(am) reflect two different nomination procedures: independent candidates submit nomination papers, while major party candidates are nominated and certified by their party. *See* Wis. Stat. §§ 8.16(7), 8.20(8)(am). They provide a reasonable, nondiscriminatory process—and reasonable deadlines—by which candidates must demonstrate sufficient support.

Independent candidates demonstrate sufficient elector support to qualify for the ballot by submitting nomination papers with the requisite number of signatures from throughout the state. *See* Wis. Stat. § 8.20(2)–(10). The nomination papers must be submitted to the Commission by

"the first Tuesday in August preceding [the] presidential election," which, this year, was August 6. Wis. Stat. § 8.16(7). Major party candidates—meaning candidates of parties entitled to partisan primary ballots (*see* Wis. Stat. § 8.16(7))—have demonstrated sufficient elector support through their party's performance in prior elections or other means. *See* Wis. Stat. § 5.62(1)(b)1., (2)(a). Major parties thus select their nominees for president and vice president at their respective conventions and then certify the names of the nominees. *See* Wis. Stat. § 8.16(7). The certification must be submitted to the Commission no later than "the first Tuesday in September preceding [the] presidential election," which, this year, was September 3. *Id*.

Those deadlines reasonably reflect the time needed to review nomination papers with signatures of thousands of electors for sufficiency and to process any challenges to those papers from voters and opposing candidates. The extra time is not needed for major party candidates because they do not file nomination papers.

Here, Kennedy makes no claim that the August 6 deadline was a burden of such a "character and magnitude" such that the challenged ballot access deadlines run afoul of the constitution. *See Burdick*, 504 U.S. at 433 (quoting *Anderson*, 460 U.S. at 789). He makes no effort to assert that it was a burden at all, much less a severe burden, to comply with the August 6 deadline to submit his nomination papers. He does not even show (or assert) that he felt ambivalent about running for President and wanted to wait longer to see how the race shook out.

Wisconsin's deadlines for submitting nomination papers and declarations of candidacy are modest, reasonable restrictions on ballot access that further legitimate state interests. They are plainly constitutional.

d. Equal protection principles provide no right for a candidate to be removed from a ballot.

A state's legitimate interest in requiring presidential candidates to demonstrate sufficient electoral support before appearing on the ballot answers the constitutional question here. Kennedy's view that equal protection affords a right to be *removed* from the ballot is legally unsupported.

To the extent Wisconsin law addresses the ability of a candidate to "disassociate" with a party, the law makes no reference to political party. Wisconsin Stat. § 8.35(1) provides that "[a]ny person who files nomination papers and qualifies to appear on the ballot may not decline nomination. The name of that person shall appear upon the ballot except in case of death of the person."

Kennedy implies that he has been treated differently than President Biden—and in a way that violates his equal protection rights—because Biden was permitted to withdraw from the election, but Kennedy was not. That is wrong. The Commission received no declaration of candidacy from Biden, nor did it receive a certification from the Democratic Party nominating Biden pursuant to Wis. Stat. § 8.16(7). Kennedy's complaint that Biden was treated differently—and better—than him is simply untrue.

Kennedy offers *no* case suggesting that there is an equal protection right of "disassociation" or an equal protection violation based on a desire to withdraw from a race.

e. Kennedy has no First Amendment right to be removed from the ballot.

Kennedy asserts he has a First Amendment right to remove himself from the ballot despite Wis. Stat. § 8.35(1), arguing that his name on the ballot amounts to compelled

speech or a violation of his associational rights. Relevant case law counsels otherwise.

First, no case has held that a candidate's name on a ballot is compelled speech. Kennedy asserts that he wants voters (at least Wisconsin voters) to know that he actually supports a different candidate for the Presidency. (R. 3:10–11.) The ballot is not the way to express such views.

In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362 (1997), the U.S. Supreme Court rejected a political party's claim that Minnesota's fusion ban—which prevented a candidate from appearing on the ballot for two different parties—violated the First Amendment on the theory it prevented the party from communicating its support of that candidate:

> We are unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.

Id. at 362–63. The Court reasoned that the party retained many options in speaking about who it supported:

> The party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate.

Id. at 363.

The U.S. Court of Appeals for the Ninth Circuit similarly declined to treat ballot language as compelled speech in *Caruso v. Yamhill County*, 422 F.3d 848 (9th Cir. 2005). There, plaintiff challenged required words in a ballot initiative title, arguing that it compelled him to be associated with that state's message. *Id.* at 858. The court disagreed, holding that the language did not require him to use his

private property to transmit any message, which appeared only on ballots—materials created by State and local governments. *Id.* The court also noted that Caruso remained free to publicly disassociate himself from the message. *Id.*

The same is true here. Contrary to Kennedy's characterization of a ballot as his own speech, it is the government, not Kennedy himself, that is "stating" he is a candidate. Kennedy says he wants to express his support for Donald Trump, but the ballot is not the place to advance those views, and he can communicate that message through a myriad of speech platforms, including appearances and endorsements.

Second, Kennedy's free association argument is also a non-starter. The one on-point case the parties have discovered rejected the idea that there is a constitutional right to have a candidate removed.

Voters may have associational rights to have a candidate's name *included* on the ballot because a voter wishes to associate with the candidate by casting his or her vote in the candidate's favor. *Bullock,* 405 U.S. at 134; *see also Berg v. Egan*, 979 F. Supp. 330, 336 (E.D. Pa. 1997) (citing *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973)). Such interests favor keeping Kennedy on the ballot because some voters who wish to vote for him have objected to his removal from the ballot.

In contrast, no case holds that there is a converse right: that voters, much less candidates, have a constitutional right to have a candidate's name *removed* from the ballot. In a case brought by voters seeking to remove a candidate's name from a Maryland ballot after that state's deadline to do so, the Maryland court of appeals explained why that state's prohibition on removal violated no constitutional right:

> This case is therefore unlike cases in which candidates were denied access to the ballot, and the challenged provisions restricted the pool of candidates

> on the ballot from whom voters could readily choose. As applied in this case, these provisions did not limit candidate access to the ballot or the ability of a voter to select a preferred candidate. Appellees conceded that, while early candidacy filing deadlines have sometimes been held unconstitutional when they restrict access to the ballot, they were unable to find a case holding that a withdrawal deadline was unconstitutionally early. This should not be surprising, as a withdrawal deadline by itself does not restrict access to the ballot.

Lamone v. Lewin, 190 A.3d 376, 391 (Md. App. 2018).

Kennedy has no constitutional right to have clerks remove his name from the ballot.

C. *Hawkins* supports the outcome below.

While the circuit court did not decide the motion under *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877, that decision also supports the result here.

In *Hawkins*, this Court recognized that last-minute election changes can "cause confusion and undue damage to . . . the Wisconsin electors who want to vote." *Id.* ¶ 5. The court considered a petition for leave to commence an original action filed by two Green Party candidates who were excluded from the ballot due to insufficient signatures on their nomination papers. *Id.* ¶¶ 1–2. The petitioners asked for preliminary relief—adding their names to new ballots for President and Vice President—after absentee ballots had already been sent out by municipal clerks. *Id.* ¶¶ 2–6, 8, n.2. This Court concluded that under the circumstances, including the fact that the general election had "essentially begun," it was "too late" to grant them any form of relief that would be feasible and not cause undue damage to the election. *Id.* ¶ 5.

Here, the clash between Kennedy's late request and the realities of election administration is just as acute as in *Hawkins.*

* * * * *

The enormity of the relief Kennedy seeks justifies this Court's acceptance of bypass. With just weeks to go, and clerks fully engaged in ensuring that voters receive their ballots, can successfully vote, and have their votes correctly tabulated, Kennedy's unsupported legal claims do not justify redeploying local officials to sticker application and imperiling voter machine functioning, accurate tabulation, and voter confidence in the election.

The circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Long,* 196 Wis. 2d at 695. Its decision should be affirmed.

CONCLUSION

The Commission asks this Court to grant the petition for bypass and affirm the circuit court's order.

Dated this 19th day of September 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b), (bm), (c), and (g), 809.62(2), and 809.81 for a petition produced with a proportional serif font. The length of this petition is 7506 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 19th day of September 2024.

Electronically signed by Charlotte Gibson
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